No. 596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, *Petitioner*

v.

WALTER KORPAN

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF D. GOTTLIEB AND CO. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF.

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INDEX

INDEX TO APPENDICES

CITATIONS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

This review turns on the application of a two-rate federal excise tax (Internal Revenue Code of 1954, 26 U.S.C., Sections 4461-2) levied on coin-operated devices in the two categories "amusement" and "gaming." These devices are complicated in structure and lend themselves to endless variation in design. But within the industry which produces them the features distinguishing the two categories are well known.

The movant, D. Gottlieb & Co., is a leading producer of non-gaming amusement devices of a type commonly known as "pin-ball" machines. The machines involved in the instant review also incorporate "pin-ball" features, though they are more commonly known as "bingo" or "in-line"

machines and contain structural elements which mark them unmistakably as gaming devices.

Movant respectfully prays leave to file the appended brief (with consent of the Solicitor General but over the opposition of respondent Korpan) for the following reasons:

First, neither the Solicitor General nor respondent Korpan, who is a beach-resort proprietor, is likely to develop fully the technical distinctions, well known to the coin-machine industry, by which amusement- and gaming-type devices are separable. Whatever the outcome of this appeal, the Honorable Court would be well served in having before it a brief analysis, by a responsible manufacturer such as movant, of the evolution of these devices and the structural features (repeatedly alluded to in the record below) which determine their gaming or non-gaming character. In this capacity movant respectfully volunteers as a true friend of the Court.

And secondly, movant has a direct interest in two propositions that appear to be developing in the instant proceeding: (1) that the statutory phrase "so-called 'slot' machines" describes only a few almost-extinct varieties of an old drum-and-reel gaming device known in the trade as "bell" machines, thus excluding all later modifications and variants from the gaming category; and (2) that "a pin-ball machine the operation of which involves the element of chance as the result of which the player may become entitled *either to free plays* or to money" is a gaming device. (Quotation, with emphasis added, is from Statement of the Question in petitioner's Petition for a Writ of Certiorari, p. 2). If the first of these propositions were affirmed, gaming devices would be admitted wholesale to the more favored amusement-device tax category, subjecting movant's products to unfair and possibly fatal competition. If the second were affirmed, movant's own devices, by reason of their free play feature, would be transferred to the penalized gambling-device category, with similarly disastrous results.

Movant believes, and desires to urge before the Court, that both these propositions are erroneous.

Wherefore it is respectfully prayed that leave be granted to file the appended brief as *amicus curiae*.

Respectfully submitted,

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ARGUMENT

Respondent Korpan's key argument appears to be that Congress intended only to tax one narrow class of gaming device at the $250 rate (controlled by the definition in Section 4462(a)(2), 26 U.S.C.), thus necessarily consigning all the rest, whether gaming or not, to the more favored amusement-device category and the $10 rate (controlled by the definition in Section 4462(a)(1), 26 U.S.C.). Petitioner will assuredly meet this argument by offering a study of

pertinent legislative history. Besides, the statutory language (Sections 4461-2, 26 U.S.C.) virtually compels recognition of a broader dichotomy, referring throughout to coin-operated *amusement or gaming* devices; and respondent will be hard put to obliterate this phrase in favor of his exotic contention that all else must fall before the four words "so-called 'slot' machines."

But it is also deemed important by this *amicus curiae* that, from the practical view of those familiar with coin-operated machines, no distinction *except between "amusement" and "gaming" types* has ever been intelligibly drawn or effectively enforced. Through the years, efforts by a host of lawmakers to classify these machines according to appearance or subordinate elements (e. g., degree of skill, cash pay-offs, presence of a "drum" or "reel", end use to dispense merchandise, etc.) have been promptly frustrated; each labored description has merely evoked new waves of camouflaging gimerackery from segments of the industry whose resourcefulness in this respect seems boundless.

This *amicus curiae* believes Congress wisely chose to lay the line simply and unequivocally between the classifications "amusement" and "gaming" in Sections 4461 and 4462. It hopes petitioner will prevail upon this Honorable Court to affirm that the line lies there, and to reject the emasculating distortion urged by respondent. To this end it will respectfully argue that the machines in question do *not* avoid the gaming category, that they cannot be identified with the amusement category they seek to simulate, and that respondent's effort to equate so-called "slots" with so-called "one-armed bandits" is at variance with all known terminology and usage within the coin-machine industry. In conclusion, reference will be made to a test of "gaming" suggested by the petitioner, based on one element only, namely, the award of free plays, with a plea that this suggestion be either clarified, or else rejected and disregarded, in the consideration of this case.

Point I

The so-called bingo machines presented to the Court in this case are also "so-called 'slot' machines," basically identified with the "slots" of fifty years ago, allowing only for improvements and camouflaging innovations.

Coin-operated amusement and vending machines were commonplace in the United States during most of the Nineteenth Century—nickelodians, penny scales, gum-ball and candy-ball devices, and various equipment of the "arcade" variety. The first coin-operated *gambling* machines of commercial importance were developed by Charles Fey, of San Francisco, and Herbert Stephen Mills, of Chicago, around the turn of this century. These were "bell" or "bell-fruit" machines, and they and their progeny also came to be known as slot gambling machines, slot machines, or merely "slots." See, Anno.: 132 A.L.R. 1004 (1941).

All the non-gambling machines which preceded the inventions of Fey and Mills performed two characteristic functions: they received the consideration from the patron (ordinarily by the deposit of a coin) and they controlled the consideration returned to the patron (usually by delivering something to him, allowing him to make use of the machine in some way, or rendering him some service). The Fey-Mills machines had a third characteristic function: they also received the consideration from the patron (now, the player), and controlled the return, *but they introduced the element of chance, so the return was not the same for each successive operation of the machine.* For many years the chance was determined, in typical machines, by a set of three visible, spring-operated drums or reels, which paid off when certain combinations of symbols came into alignment. This was the notorious "one-armed bandit," which "put commercialized gambling on a five-cent basis and made gambling easily accessible to the general public."* Illus-

* Anon., "Slot Machines and Pinball Games," 269 Annals of the American Academy of Political Science 62 (May, 1950).

trative trade-journal material describing this basic device is gathered in Appendix A, Exhibits A-1 through A-4, at pages 1 through 4.

Substituting the coin-receiving 'slot' for the human dealer, croupier, or bookmaker of conventional gambling was a stroke of genius that brought golden returns and founded a substantial industry: "No other machine was ever invented from which the profits derived were so fabulous on so small an investment, and with so little effort."[*]

And though slot machines have gone through many surface mutations since the first models, they have never departed from any of the three characteristic functions that mark them as "gaming" devices. All, from Fey's "Liberty Bell" to the three complex models whose nature is at issue in the instant case, must necessarily (1) control the receipt of consideration from the player, (2) bring an element of chance into play, and (3) control the pay-off of return consideration, i.e., winnings. Congress could scarcely have chosen clearer language than it used to describe these functions in the very statute whose application is now in question (Section 4462(a)(2), 26 U.S.C.):

> ". . . . machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."

The trade-journal material gathered in Appendix B, Exhibits B-1 through B-20, at pages 5 through 24, illustrates the major steps in the evolution of the "one-armed bandits" and their transformation into today's "bingo" or "in-line" machines.

A. *The mint-vender* (Appendix B, Exhibit B-1)

The earliest subterfuge was an attachment, added in the pre-World-War-I era, which delivered a packet of candy or gum with each play. It was argued in many court tests that

[*] Ibid.

this alteration converted the machine into a *bona fide* vending machine by assuring at least *some* return for each coin deposited, i. e., divorcing the return consideration from the element of chance. See, *City of Moberly* v. *Deskin*, 169 Mo. App. 672, 155 S.W. 842 (1913); *State of Rhode Island* v. *Certain Gambling Instruments*, 46 R. I. 347, 128 Atl. 12 (1925); *Boynton* v. *Ellis*, 57 F. 2d 665 (C.A. 10, 1932). Cf., *Davies* v. *Mills Novelty Co.*, 70 F. 2d 424 (C.A. 8, 1934). Anno.: 81 A.L.R. 177 (1933); 135 A.L.R. 141 (1941).

B. *Ticket, check and token pay-offs* (Appendix B, Exhibits B-1, B-6)

Where repressive legislation focused on cash payments, the industry early developed physical substitutes for cash —paper or metal counters emitted by the machine and which could be redeemed by the location owner or, in later models, replayed through the coin chute.

C. *Merchandise pay-offs* (Appendix B, Exhibits B-2, B-3)

Also to avoid the cash-payment ban, a variety of machines were developed which paid off directly in merchandise, most frequently cigars, cigarettes or tobacco. See, *Lang* v. *Merwin*, 99 Me. 486, 59 A. 1021 (1905). In some versions, the machines awarded mint packets like those used in the mint venders, supra, with the added feature that various colored packets would serve as counters for cash redemption by the location owner.

D. *"Skill" attachments* (Appendix B, Exhibit B-4)

From time to time the courts accepted the argument that pay-offs were allowable if governed, even in part, by some test of skill besides the element of chance. See, *Rouse* v. *Sisson*, 190 Miss. 276, 199 So. 777 (1941); *Centreville* v. *Burns*, 174 Tenn. 435, 126 S.W. 2d 322 (1939). This encouraged a rash of attachments and superficial embellishments. See *Hoke* v. *Lawson*, 1 A. 2d 77, 175 Md. 246 (1938). Anno.: 135 A.L.R. 138 (1941).

E. *The console and table models.* (Appendix B, Exhibits B-4, B-5)

After the development of bona fide amusement devices in floor-standing console and table models, the slots also appeared in console and table versions. In some instances this mere change in housing enabled the gaming units to penetrate areas where the traditional counter-size models had been eliminated.

F. *"Flashers" and internal chance-determining components.* (Appendix B, Exhibits B-5, B-6, B-18)

Following the advent of electrification, in the early 'thirties, a major development occurred: the visible drum-and-reel component disappeared and the same function of chance selection was performed by a power-driven combination of contact wheels and wiper fingers, often connected to lighting circuits that caused the machine to "flash" as the electro-mechanical determinations were made. This permitted the essential gaming element of chance-determination to be built into virtually any kind of coin-operated machine.

G. *"In-line" machines.* (Appendix B, Exhibits B-6, B-7)

To avoid the opprobrium of the bell-fruit-bar symbols, while yet retaining the operation of matching line-ups, the industry turned to familiar "keno" and "bingo" number arrangements, which made their appearance in many forms. Other symbols were also substituted, e. g., words, animals, cigarette brands, etc.

H. *Adaptation of the pin-ball feature* (Appendix B, Exhibits B-7, B-8, B-9)

As will be more fully developed under Point II, below, a bona fide amusement-machine industry began to flourish in the early 'thirties in the manufacture of pin-ball games. These were permitted where gaming machines had been outlawed; it was natural, therefore, that the gaming varieties would emerge in a large number of pin-ball guises,

and this they did. Simultaneously, the situation was confused by the manufacture of pin-ball games which awarded cash pay-offs for the achievement of high scores, touching off a series of skill-vs.-chance decisions. See, Anno.: 135 A.L.R. 104, 149-157 (1941). But the clearer evil was the machine which combined mechanical chance selection (by the unit described in "F", above) with some kind of subterfuge pin-ball play.

I. *Multiple coin chutes* (Appendix B, Exhibits B-8, B-11)

To enhance the odds and increase the operator's return, a multiple coin chute was added to some machines, permitting the deposit of several coins prior to each play.

J. *Free games and the "knock-off button" or "replay meter."* (Appendix B, Exhibit B-12).

In the late 'thirties an important innovation in the amusement-device field was followed promptly by a clever adaptation of the same mechanism to the gaming machines: a free-replay device was developed, connected to the coin chute so that pin-ball players making high scores could reactivate the machine and play off games awarded to them without any intervention by the location owner*; in the gambling adaptation this same free-replay circuit was connected to a button permitting free games to be "knocked off" without being played, and a meter, locked inside the machine, was added to record the number of free games thus taken off by the button. The result was that *once again*

* The coin-machine industry is universally divided into four vertical categories: the *manufacturer*, who sells his product outright for cash or short-term credit; the *distributor*, who is a wholesaler, buying from the manufacturer and selling, often on long-term credit, to the *operator*, who owns, operates, and services a number of machines; and the *location owner*, the pharmacist, barkeeper, restaurant-proprietor, etc., on whose premises the machines are actually made available to the public, on a percentage-split basis with the operator. Location owners almost never own their own machines, because of the required capital outlay, servicing problems, and the fact that machines lose their novelty and grow "stale" in a few weeks at one location.

the machine could control the pay-off of winnings, for the meter served as a fool-proof accounting system with the location-owner. He paid the money, for games he "knocked off," from his till; but the machine kept a record by which he could be exactly reimbursed when its earnings were divided. This was as accurate and effective as checks, tokens, tickets, colored mints—or letting the machine itself spit coins in payment of winnings.

K. *Multiple play feature* (Appendix B, Exhibits B-12, B-13)

A refinement of the multiple coin chutes ("I," above) was achieved by equipping the machines to take several coins, one after the other, each automatically changing the play conditions, e. g., giving higher odds, etc., before the actual play was commenced. A refinement of *this* was then achieved by putting a "flasher" or mechanical chance selector (described in "F", above) into each circuit so each additional coin might, or might not, give the player higher odds or other advantages. Thus, in effect, the player could play several old-fashioned drum-and-reel operations, each for a coin, before using the play feature of the machine at all.

L. *The advent of the "one-balls."* (Appendix B, Exhibits B-11, B-12 through B-15)

In the 'forties the gambling-device industry flooded the country with machines which came to be known as "one-balls" because they featured a pin-ball or roulette-type table on which the player shot a single ball—after playing one or more coins through one or more chance selectors (described in "F", above) to set the odds, etc. For all its altered appearance, this variation was essentially identical in operation with the old "one-armed bandit." Shooting the single ball was as mechanical, and nearly as unimportant to the play, as pulling the old-fashioned spring lever arm. The one-ball machines usually paid off in "free games," adapted to cash payouts by the knock-off button

and replay meter (described in "J", above). They caused much litigation, and dominated the gaming coin-machine field in the post-war years. See, *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P. 2d 1108 (1941); *People v. Gravenhorst*, 32 N.Y.S. 2d 760 (1942).

M. *Multiple board feature.* (Appendix B, Exhibits B-6, B-7, B-16, B-17, B-19, B-20)

The only innovation since the one-balls is essentially a return to the use of five balls again, plus much-increased complexity; the player may extend the possible effects of each play by depositing additional coins to bring more than one board, or playing section, into operation and to activate other "game features." This usually increases the absolute amount the machine may pay, as for instance, from $4-for-10c to $24-for-60c, rather than the odds themselves.

N. *Score adjuster or reflex unit.*

Gambling-adapted machines usually contain electrical switches, keys or circuit breakers which can be manually adjusted to make them pay off with more or less-frequency. Recently, an electro-mechanical device known as a "reflex unit" has been developed and installed in some of these machines to make this adjustment continuously and automatically. A series of "wins" will cause the unit to reduce the hidden odds (circuits on the chance selectors) against which the player is playing; a long period of few wins will cause the unit to reverse and activate more circuits. Amusement-type machines never contain these units, which are complex, expensive, and quite unnecessary where no payoffs are to be made.

O. *Current versions: the "bingo" and "in line" machines.* (Appendix B, Exhibits B-17 through B-20).

In 1951 Congress enacted the Johnson Act (64 Stat. 1134, 15 U.S.C. 1171-1177), which seriously disrupted the distribution of identifiable drum-and-reel machines. Efforts were also made, sometimes successfully, to apply the Act to "one-balls," which had by this time saturated the field. See,

United States v. *19 Automatic Pay-Off Pin Ball Machines*, 113 F. Supp. 230 (D. C. La., 1953). So the gaming-machine industry turned to the new "five-ball" machine, known in the trade as "bingo" or "in-line." It is among the fastest "action" machines ever produced, for it has all the following features: it is a table model resembling the bona fide amusement pin-ball games ("E", "H", above); it contains several chance selectors ("F", above) which control odds and "game" features that permit multiple play by the deposit of several coins before each operation ("K", above); it incorporates the multiple board feature ("M", above); it contains the automatic reflex unit ("N", above); and it pays off by the fool-proof, hard-to-detect "free game" method controlled by a "replay meter" ("J", above). It is noteworthy that the "knock-off button" is no longer physically present. An ingenious circuit arrangement removes (and records) the free games whenever the plug-connection for the machine's power supply is removed from its wall socket.

* * * * * *

The foregoing enumeration covers most of the principal steps in the development of gaming machines, though the list could be extended.* A recent development, now plaguing enforcement authorities, is the remote control "trade booster," a mechanism designed to take the place of the coin chute, installed away from the machine so the location owner can collect the player's deposit and push a button or throw a switch to start the play—from which it is argued that this version cannot offend public policy or endanger public morals because it is not "coin operated." See, *United States* v. *Asani*, 138 F. Supp. 454 (N. D. Ill., 1956), aff'd, C.A. 7, Jan. 15, 1957, pending on petition for certiori, *Milner* v. *United States*, No. 813, October Term, 1956.

If the gaming machines now before the Court are not

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* The "tilt" device referred to in the record below is common to all pin-ball machines of both gaming and amusement types. It simply turns the operative mechanism off when the machine is tipped (to prevent players from rolling the balls backwards up the board) or struck (to prevent damage to the machine).

"so-called 'slot' machines," where did they depart their ancestral line? Was it in substituting the multiple play feature for the old-fashioned spring handle? Or the replay-meter subterfuge for the pay-out mechanism that used to spit winnings in jingling coins? Or was the alchemy achieved when visible reels disappeared in favor of discs and wiper fingers concealed beneath the disarming simulation of a pin-ball table?

Slot machines are coin-operated gaming devices, a plain classification that began with the "one-armed bandit" and has grown apace with each succeeding development in the field. See, *People* v. *Gravesboro*, 32 N. Y. S. 2d 760 (1942). Anno.: 38 A.L.R. 73 (1925); 135 A.L.R. 104, 138-164 (1941). In 1941, Congress was surely addressing itself to the slot machines of 1941, not those of 1900. And now the Government properly urges an identical application of the same phrase to the slot machines of 1956 and 1957. This amicus curiae respectfully supports the Government's position, unqualifiedly, on this important point.

Point II

Amusement pin-ball machines are clearly distinguishable from their gaming counterparts, and are not "so-called 'slot' machines," even though coin operated.

Responsible manufacturers of amusement-type machines do not claim overbearing social worth for their products. The games they market—primarily pin-ball games—give harmless amusement and diversion, for a very modest consideration. They please their patrons, momentarily, perhaps, by providing an animated, somewhat challenging test of luck and skill, which is its own reward and which makes no appeal to the so-called gambling urge. They own to serving human idleness. But they do not exploit human weakness.

The pin-ball game may fairly stand for judgment in the company of juke boxes, soap operas, county fair concessionaires, comic books, B-minus movies, and the merchan-

disers of slightly toxic substances like tobacco. In such company these devices hold their own. What injures them undeservedly is their perennial identification with the gaming-device industry and the unsavory twilight zone of illegal gambling. And as noted in the argument under Point I, above, confusion in this respect is sometimes deliberately fostered.

The coin-operated pin-ball game is no relation of the gambling slot machine; it has a different forbear, the Victorian parlor game "bagatelle," and it appeared on the scene a quarter of a century after the drum-and-reel slots had made their profitable mark. The first pin-balls (also called "marble" games) were marketed about 1930 and were simple, inexpensive counter playthings aimed at penny revenues. (See Appendix C, Exhibit C-1). The devices were popular, and by 1933 they had appeared in a table-top version (Appendix C, Exhibits C-2, C-3), followed by the development of battery-powered lights and sound effects and a rudimentary back-board or light box (Appendix C, Exhibit C-4). A few years later the light box was developed to incorporate score indicators and other novelty features (Appendix C, Exhibits C-5, C-6).

In the late 'thirties, as has been noted, a bona fide free game mechanism was developed, connecting the score indicator directly to the coin chute so that players making high scores could be awarded one or more free games directly and automatically—to be played off immediately by working the chute to reactivate the machine. See, *Chicago Patent Corporation* v. *Genco, Inc.*, 124 F. 2d 725 (C.A. 7, 1941). This was the innovation which was promptly converted, by the gaming-machine manufacturers, by the addition of a "knock-off button" and "replay meter," into a subterfuge to control pay-offs on their products. (See Point I, "J," supra, p. 11). But it also remained as a feature of the non-gaming types. A practical difference, noteworthy in passing, is that the bona-fide amusement machines never award more free games than can, within reason, be actually played off—25 at the maximum and more usually 10

or 5; while the gaming-adapted varieties are usually built to award any number up to the limit of three digits, i.e., 999.

In subsequent developments, while the one-ball and bingo gaming machines retained comparatively simple play boards (Appendix B, Exhibits B-18, B-19, B-20), the amusement types became more and more complex, with genuine emphasis on the entertainment value of "flippers," "bumpers," "traps," "gates," "kickers" and other scoring and play novelties (Appendix C, Exhibits C-7, C-8).

It would outrage the classic affinity of pot and kettle to claim that the coin-machine industry, nearly all of which centers in the environs of Chicago, has been forever neatly split between gaming and non-gaming factions. As has been noted, amusement-type pin-ball games made their appearance in the thirties with pay-out mechanisms to reward high scores in cash, tokens or redeemable tickets. And nearly everyone made one-ball machines and one-ball components in the middle 'forties (after nearly everyone had acquitted himself creditably in war production).

But in 1949 a split *did* occur, and since then one segment of the industry has been policing itself and striving to dissociate itself and its products from the other. The federal policy of taxing gaming devices in a specially-identified category is so important in maintaining the distinction, and so effective in compelling local authorities to recognize it, that the very survival of one group or the other may be at stake in the decision of this case.

Amusement pin-ball games cannot compete with any variety of the gambling-adapted slots; hence they have never been tied up with crime syndicates, municipal corruption, or racketeering. When a community goes "wide open," or succumbs to the mobsters and "fixers," its coin-operated amusement games are among the first casualties. The gaming machines cost over $600, while amusement types sell for less than $300; but the average weekly earnings of a well-located pin-ball amusement game might be $15 where its gambling-adapted counterpart would bring

in as much as $300 to $400 at the same location in the same period.*.

In sum, the amusement-type pin-ball machine is plainly distinguishable from the gaming devices that seek to imitate its appearance and operation. Congress had *both* categories in view when it chose to separate them and impose the tax at different rates. In the first enacted version of Section 4462(a)(1), defining the amusement category, the phrase "so-called 'pin-ball' . . . machines" was actually inserted (Act of Sept. 20, 1941, 55 Stat. 722); but this was dropped by amendment the following year (Act of Oct. 21, 1942, 56 Stat. 978)—strongly suggesting, though the legislative history is sparse, that the lawmakers were then acknowledging precisely what the Government now urges, namely, that "so-called 'pin-ball' machines" might fall in either category, while "so-called 'slot' machines" properly served to describe gaming devices only.

Point III

The Court below erred in identifying so-called one-armed bandits—the most venerable drum-and-reel forbears of modern gaming machines—with the statutory phrase "so-called 'slot' machines."

The Circuit Court concluded that the bingo machines at issue on this case necessarily fell into the amusement category because they were not "so-called 'slot' machines" within the meaning of Section 4462(a)(2).** In reaching this result the Court observed that the gaming-device character of the machines "may well be conceded," and that "if the

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* See, Anon., "Slot Machines and Pinball Games," 269 Annals of the American Academy of Political Science 62, 68-9 (May, 1950).

** The Court seems to have disregarded the violence done to the $10 category (Section 4462(a)(1)) by its conclusion that if the machines had to be excluded from the gaming classification they would automatically fit the alternate definition, "any amusement or music machine . . . etc.," in the dichotomy.

dictionary definition of 'slot machine' were applied, it is clear that these machines would be covered . . . "*

The Court's conclusion, thus avowedly at variance with the sense of the statute and the literal meaning of the statutory language, is based upon extrinsic evidence of the meaning of the phrase in dispute, consisting primarily of a suggestion by the defendant

> " . . . that the term 'slot machine' as used in Section 4462 refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit (colloquially called a 'one-armed bandit')." **

This suggestion is flatly erroneous. From the day of Charles Fey's "Liberty Bell" (Appendix A, Exhibit A-1) to the present, machines of the one-armed bandit variety have been known as "bells," or "bell-fruit machines." (Appendix A, Exhibits A-2, A-3, A-4.) Even when the industry sought to camouflage the original models (Appendix B, Exhibits B-1, B-5, B-9, B-10) it still used the designation "bell"—except where one manufacturer offered to carry the camouflage a step further by providing "either Bell Fruit symbols or the interesting new tobacco symbols." (Appendix B, Exhibit B-9).

Industry usage is in accord with the common-sense interpretation of the language of Section 4462(a)(2) urged by the Government: the "slots" are, generically, the coin-operated gaming machines, including the original one-armed bandit and all its later progeny. The "bells" are a variety of "slots," and it is not incorrect to refer to "bell slots." But the Circuit Court was misled in concluding that *only* bells are slots as, in more familiar fields, it might have erred in holding *only* kodaks to be cameras or *only* sedans to be automobiles.

Moreover, the Court relies on another misconception in

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* *United States* v. *Korpan*, 237 Fed. 2d 676, 679, 681 (C.A. 7, 1956).
** Ibid., 680.

reasoning that Congress must have intended a restrictive meaning for the term "slot machine" because, "Otherwise, there appears no purpose for the use of the language 'so-called "slot" machines'," when read in conjunction with the statutory language " . . . which operates by means of the insertion of a coin, token or similar object . . . ."* Even though the lawmakers' intent in connection with this double definition remains obscure in the legislative history, the drafter's problem that gave rise to it is obvious. It was not enough to leave the splendid generic definition of gaming, in the latter part of Section 4462(a)(2),** standing alone, for then *any* mechanism "which, by application of the element of chance, may deliver . . . etc.," would have been included, *whether it was coin-operated or not.* This would have laid the tax on parimutuel totalizers, roulette wheels, wheels of fortune, chuck-a-luck cages, and similar devices.

To avoid this, the draftsman added the best-known synonym for *coin-operated* gaming devices: "so-called 'slot' machines." But he was still left facing a loophole, for slot machines were by tradition *literally* coin-operated: What about the machine that might be activated by a token, key, slug, or some other object not within the definition of a coin? This latter problem he disposed of simply by specifying in the enacted phrasing "which operate by means of insertion of a coin, token, or similar object." Thus understood, the two definitions compliment each other, without in any way suggesting limitation of the scope or meaning of either by the other.

The Court states that it sees force in defendant's conclusion as to the narrow meaning of the phrase "slot machine"—" . . . when the language thus employed is used in the light of the legislative history of Section 4462." Then, after reviewing the pertinent Congressional references, the opinion continues, "Although the legislative his-

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* *United States* v. *Korpan*, 237 F. 2d 676, 679 (C.A. 7, 1956).

** I.e., the language quoted supra, at page 8.

tory of Section 4462 does not clearly demonstrate the meaning and purpose which Congress intended to attribute to the language, 'so-called "slot" machine,' it does indicate that Congress intended to exclude pinball machines . . . etc."*

It is thus respectfully submitted that the learned Court below mistook the universally-understood meaning of the phrase "so-called 'slot' machine" in equating it with so-called one-armed bandits; that its opinion errs in limiting the phrase by intrinsic interpretation; and that the opinion itself concedes the inconclusiveness of the available legislative history.

Point IV

The mere awarding of free plays, by automatic operation of a bona fide amusement machine, and without any permanent recording feature, does not convert the machine into one properly characterized as a gaming device.

In framing the question presented by this case the Government has introduced an element, not strictly related to the main issue, which is of vital concern to this *amicus curiae*. The Court is asked to consider, and possibly to decide, whether machines the operation of which involve an element of chance are gaming devices within the meaning of Section 4462(a)(2) if "the player may become entitled *either to free plays* or to money." (Quotation is from petitioner's Petition for a Writ of Certiorari, p. 2.)

There has been much dispute, and some conflict in the authorities, over the question whether the award of free plays, per se, constitutes a valuable "prize"—or whether it is merely a feature of the amusement offered the patron for his initial consideration. See, Anno.: 148 A.L.R. 879.

While this line of cases is not up for review in the instant proceeding, the weight of authority and the better reasoning seems to be aligned with the latter proposition. See, *Washington Coin Machine Ass'n* v. *Callahan*, 142F. 2d

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* *United States* v. *Korpan*, 237 F. 2d 676, 681 (C.A. 7, 1956).

97 (C.A.D.C., 1944). Cf., *Holliday* v. *South Carolina*, 78 F. Supp. 918 (D.C.S.C., 1948), aff'd, 335 U.S. 803.

At very least, the intrinsic worth of a few *gratis* plays on a five-cent or ten-cent amusement device approach the level of "*de minimus* . . . " as a prize-inducement likely to injure society by exploiting man's innate urge to gamble. But, in any event, the free-game problem really turns around something else. As has been set forth in the preceding argument, gaming-type slot machines were modified to incorporate pin-ball features as a camouflage (Point I, "H," page ...; Appendix B, Exhibits B-3, B-), and when the free-game mechanism was developed, the gaming-machine industry quickly adapted it as a subterfuge to control pay-offs (Point I, "J" page 11; Appendix B, Exhibit B-12). Hence it was the gaming adaptation, by means of the "knock-off button" and "replay meter," and not the mere awarding of free games, that permitted free-play pin-ball machines to be used to evade and defy local anti-gambling laws. See, *People* v. *Gravenhorst*, 32 N.Y.S. 2d 760, 770 (1942); *In re Sutton*, 148 Pa. Super. 101, 24 A. 2d 756, 760 (1942), Cf., *In re Wigton*, 15 Pa. Super. 337, 30A. 2d 352, 354 (1943).

This distinction is not always easy for the indifferent observer to grasp. But it is a distinction based on fact, not merely on speculation or opinion. And it cannot be urged too emphatically: *the free-game award device on an amusement machine does not facilitate gambling.* When the machine rewards high scores by free replays which must actually be played off, the result may even be the opposite, for any additional award to the patron would tend to be cumulative and superfluous as a play-inducement. But more importantly, *so long as the replays are unrecorded, the machine cannot control pay-offs based on them, and no accounting is possible between the operator and the location owner if such a practice were actually followed.*

Of course it is quite possible for the location-owner to pay those who play the machines a valuable consideration, *qua* prize, for free games won—just as it is possible for him to